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Supreme Court of the United States

OCTOBER TERM 1942

No. 862

HERMAN A. HINZE, CARL E. STURM, ENDRE A. SHARPEE, ET AL.,

Petitioners,

v.

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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v.

MORVIN DUEL, COMMISSIONER OF INSURANCE, AS LIQUIDATOR OF THE WISCONSIN MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners seek a writ of certiorari to review the action of the Supreme Court of Wisconsin in affirming three orders of the Circuit Court for Dane County, Wisconsin, made in the course of the liquidation of the Wisconsin Mutual Insurance Company.

Petitioners have filed with the clerk of this court copies of their brief in support of their motion for rehearing in the Wisconsin Supreme Court, and have caused a copy of such brief to be inserted in the printed Record, pages 143-209.

In view of petitioners' references to their brief on rehearing in the court below, respondent is filing herewith, at the suggestion of the clerk of this court, nine copies of its briefs filed with the Wisconsin Supreme Court, and likewise a single copy (no more being available) of appellants' brief and appellants' reply brief, as filed in that court, in order that there may be a clear understanding of the questions presented to and decided by the court below.

Statement

The facts are fully set forth in the "Statement of Facts" by Chief Justice Rosenberry in the decision reported in 241 Wis. 394, 6 N. W. (2d) 330 (Record, pp. 127–130), and may be summarized as follows:

The order for liquidation.

On the petition of Morvin Duel, Commissioner of Insurance of the State of Wisconsin, to the Circuit Court for Dane County, Wisconsin, after due service on the Wisconsin Mutual Insurance Company of an order to show cause why it should not be liquidated, and after hearings at which it was represented by its officers, agents and attorneys, the Circuit Court entered an order, dated February 5, 1941, pursuant to Sec. 200.08, Wis. Stats. (see Appendix hereof), directing that the Company be liquidated forthwith under the direction of the Commissioner (Record, pp. 2–4, 127–128).

The assessment order of November 29, 1941.

On October 18, 1941, the Commissioner filed a petition in the liquidation proceeding setting forth the necessity for an assessment on the 9,500 policyholders (Record, pp. 4–7, 128), and, after the publication of a notice prescribed by the court (Record, pp. 8, 9) for three weeks in the official State paper (Sec. 35.63,

Wis. Stats.), and after hearings, at which certain policyholders, including the petitioner, Herman A. Hinze, appeared in person and by attorneys, the Circuit Court entered the assessment order dated November 29, 1941 directing the making of an assessment on the policyholders of the Company (Record, pp. 8–14, 128–129).

Petitioners' first motion to set aside the assessment order.

On February 28, 1942 the petitioners, Sturm and Hinze, moved the Circuit Court to set aside the order of November 29, 1941 and obtained an order to show cause returnable April 1, 1942 why the order of November 29, 1941 should not be set aside on the ground that it was excessive, illegal and inequitable (Record, pp. 14–31, 129).

At the hearing on April 1, 1942, the Commissioner opposed the motion on the merits and also raised the question of the jurisdiction of the Circuit Court to review the assessment order, since Sec. 252.10 (1), Wis. Stats., (see Appendix hereto) prohibits review after the expiration of sixty days from the end of the term at which the order was made, which period had expired. The motion was taken under advisement by the circuit judge (Record, pp. 129–130).

Petitioners' second motion to set aside the assessment order.

On April 21, 1942, the appellants, Sharpee et al., moved the Circuit Court (Record, p. 39), to reopen the proceedings and to set aside the assessment order, pursuant to Sec. 269.46, Wis. Stats., (see Appendix hereto) providing for relief from orders or proceedings obtained against a party "through his mistake, inadvertence, surprise or excusable neglect,". That motion was heard on April 24, 1942, and was taken under advisement by the circuit judge (Record, p. 130).

Orders denying motions to set aside the assessment order.

On May 26, 1942, the Circuit Court entered orders denying both the Sturm and Hinze motion and the Sharpee motion. The orders recited that no cause had been shown warranting the setting aside or modifying of the assessment order, and that such order and the assessment made thereby were reasonable, legal and equitable (Record, p. 130).

The order denying the Sturm and Hinze motion also recited that the motion had not been brought on for hearing within the sixty day period limited by Sec. 252.10 (1), Wis. Stats. (Record, p. 130).

And the order denying the Sharpee motion also recited that no cause had been shown warranting relief on the ground of mistake, inadvertence, surprise or excusable neglect (Record, p. 130).

Appeal to Wisconsin Supreme Court.

Sturm and Hinze, as well as Sharpee et al., appealed to the Wisconsin Supreme Court from all three orders, but did not print in their case or brief either of the orders of May 26, 1942 (Record, p. 56), and their counsel made no argument in their brief or orally to show that such orders were erroneous, asserting merely that consideration of the validity of such orders was postponed because "we are not certain what position counsel will take with respect to the effect of the court's conflicting conclusions" (original Brief of Appellants in Wisconsin Supreme Court, p. 78).

The Commissioner's brief as respondent in the Wisconsin Supreme Court (p. 80) pointed out that appellants had apparently abandoned their appeal from the orders of May 26, 1942; also that the order denying the Sturm and Hinze motion was properly entered because the motion had not been seasonably brought on for hearing before the Circuit Court (Brief, p. 81);

and likewise that the order denying the Sharpee motion was proper because no mistake, inadvertence, surprise or excusable neglect had been shown (Brief, pp. 82–86).

Decision of Wisconsin Supreme Court.

On the oral argument before the Wisconsin Supreme Court, appellants asked and obtained leave to file a reply brief, which again made no attack on the orders of May 26, 1942 (Appellants' reply brief in Wisconsin Supreme Court, pp. 1–57).

However, the Supreme Court of Wisconsin considered and decided every question raised by appellants whether arising under the assessment order of November 29, 1941 or under the orders of May 26, 1942, the opinion of the court opening with the statement:

> "We shall take up consideration of the questions for decision in the order in which they are presented in the briefs of counsel." (Record, p. 130)

Motion for rehearing before Wisconsin Supreme Court.

Appellants moved the Wisconsin Supreme Court for a rehearing, and their brief in support thereof for the first time raised the question that the assessment order of November 29, 1941, denied due process (Brief, p. 23).

The Commissioner's brief on the motion for rehearing (pp. 6–7) pointed out that the question of denial of due process (the asserted lack of due notice of the assessment order) had not been seasonably raised, so that the court would be justified in refusing to consider such question on the motion for rehearing.

The Wisconsin Supreme Court on December 29, 1942, denied the motion for rehearing without opinion (Record, p. 210).

ARGUMENT

I. The writ of certiorari should be denied because the record fails to show that a federal question was raised and decided adversely.

The only place in the printed record where there is any showing that any Federal question was raised in the court below is in "Appellants' Brief In Support Of Motion For Rehearing" (printed Record, pp. 143–209), which brief is not properly a part of the record.

Zadig v. Baldwin, 166 U. S. 485, 488; 41 L. Ed. 1087, 1088.

Mut. Life Ins. Co. v. McGrew, 188 U. S. 291, 308; 47 L. Ed. 480, 485.

Hon. Arthur A. McLeod, the clerk of the Wisconsin Supreme Court, advises that "Appellants' Brief In Support Of Motion For Rehearing" was not part of the record certified by him.

While such brief was inserted in the record as printed, at the request of petitioners' counsel, as the Clerk of this Court has advised, it should not be considered a part of the record before this court, since it was not a part of the record in the Wisconsin Supreme Court and was not certified as such by the Clerk of that court.

As stated above, in the absence of such brief on rehearing, there is nothing in the record to show that a Federal question was raised below and decided adversely. Consequently the petition for the writ of certiorari should be denied.

Lynch v. New York, 293 U. S. 52, 54; 79 L. Ed. 191, 193.
Honeyman v. Hanan, 300 U. S. 14, 18; 81 L. Ed. 476, 479.

The denial of the motion for rehearing by the Wisconsin Supreme Court may well have been made on non-federal grounds.

As regards the assessment order of November 29, 1941, the motion for rehearing might well have been denied on the ground that the attack on it as lacking due process came too late, i.e. had not been raised in either appellants' original or reply briefs (see pp. 8–11 hereof). In addition, such motion could also have been denied on the ground that petitioners' general appearance by moving to set aside the assessment order on grounds going to its merits constituted a general appearance which waived the alleged failure to make personal service of notice on petitioners (see p. 16 hereof).

As regards the orders of May 26, 1942 which denied petitioners' motions to set aside the assessment order, the motion for rehearing may well have been denied on the ground that the attack on those orders came too late since no attack on them was made in either petitioners' original or reply briefs (see pp. 18–19 hereof). Likewise, such motion could also have been denied on the ground that the assessment order was reasonable, legal and equitable, and on the ground that the Sturm and Hinze motion was not brought on for hearing within the time limited by Section 252.10, Wis. Stats. (see p. 20 hereof), and that no mistake, inadvertence, surprise or excusable neglect had been shown to warrant the granting of the Sharpee motion (see p. 20 hereof).

In short, no decision of a Federal question by the Wisconsin Supreme Court "was necessary to the determination of the cause".

Honeyman v. Hanan, 300 U. S. 14, 18; 81 L. ed. 476, 479.

II. The writ of certiorari should be denied because the federal claim was not seasonably made in the state court.

The claim that the assessment order was void under the due process clause of the Fourteenth Amendment was not seasonably made below since the question was first raised on motion for rehearing.

American Surety Co. v. Baldwin, 287 U. S. 156, 163–164; 77 L. ed. 231, 236.

Herndon v. Georgia, 295 U. S. 441, 443; 79 L. ed. 1530, 1532.

In *Herndon v. Georgia,* the court said:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. * * *
>
> "Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. * * * The whole point, therefore, is whether the ruling here assailed should have been anticipated." (295 U. S. 443–444; 79 L. ed. 1532–1533)

The instant case is not within the exception noted in the above quotation, i.e. one where the Federal claim arose from an unanticipated disposition of the appeal in the court below.

While the brief of appellants (petitioners here) in support of their motion for rehearing in the Wisconsin Supreme Court stated that the point—that the assessment was void because of lack of

service—"was urged both in the Circuit Court and before this court" (Rehearing brief, p. 23, Record, p. 175), the fact is that such point had not been previously "urged" in the Wisconsin Supreme Court, since "the only mention of it in appellants' main or reply briefs is in the statement of facts on pages 8 and 13 of their main brief, in which there is no suggestion that the order was invalid on account of insufficient notice" (Respondent's Brief on Rehearing, below, p. 6), and likewise no claim that the order lacked due process.

Consequently, the "long established general rule" applies, i.e. "that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

> *Herndon v. Georgia,* 295 U. S. 441–443; 79 L. ed. 1530–1532.

The record fails to show that the Wisconsin Supreme Court entertained or decided the Federal question in denying the motion for rehearing (Record, p. 210).

Failure to raise the Federal question except in petitioners' brief on motion for rehearing is not excusable on the ground of surprise.

Petitioners claim "surprise" only as regards the decision affirming the two orders of the Circuit Court dated May 26, 1942, but the question of lack of due process does not arise in connection with those orders but only in connection with the making of the assessment order of November 29, 1941. There neither is nor could be any claim that there was any lack of due process in connection with the making of the orders of May 26, 1942, for petitioners made and filed the motions resulting in those orders, and appeared in person and by their attorneys at the hearings on such motions (see Appendix A and B to Brief for Respondent before Wisconsin Supreme Court).

If want of personal service on the policyholders is an infirmity, that infirmity inhered in the assessment order itself, and was before the court on the appeal from that order, so that the petitioners had full opportunity to raise and argue the point without regard to the appeal from the orders of May 26, 1942.

It is thus clear that the asserted question of lack of due process arose only in connection with the making of the assessment order of November 29, 1941, and was thus presented by the appeal from that order, and could and should have been raised in connection with that appeal.

This becomes definitely clear from petitioners' brief on rehearing in the court below. Pages 23–45 of that brief are devoted to an argument respecting the lack of notice of the making of the assessment order of November 29, 1941, under the heading:

> "Order Of November 29, 1941, Null And Without Jurisdiction Because No Proper Service Made" (Brief, p. 23)

The following 22 pages of that brief on rehearing are devoted to the argument that the notice given to policyholders by publication was insufficient to give the Circuit Court jurisdiction to make the assessment order (Brief, pp. 25–41), and to the argument that petitioners' general appearance had not waived the right to assert the invalidity of the order on that ground (Brief, pp. 41–45).

In all these 22 pages of argument, the only mention of the orders of May 26, 1942 is a quotation (p. 23) from the Sharpee motion in Circuit Court which merely sets forth that the only service of notice of the proposed assessment order was by publication in the Wisconsin State Journal (Record, pp. 34–35).

The Commissioners' brief on the motion for rehearing (pp. 6–7) pointed out that the question of denial of due process had not been seasonably raised, so that the court would be justified in refusing to consider it on the motion for rehearing.

So, it is entirely clear that any possible question of due process was directly involved on the appeal from the assessment order of November 29, 1941, and could have been raised by petitioners on the original submission of the cause to the Wisconsin Supreme Court in their original or reply briefs before the Wisconsin Supreme Court.

It follows that "surprise", if any there was, at the affirmance of the orders of May 26, 1942 had nothing to do with petitioners' failure to present the question of alleged lack of due process in their original or reply briefs, in connection with their appeal from the assessment order of November 29, 1941.

Furthermore, there could have been no "surprise" at the affirmance by the Wisconsin Supreme Court of the Circuit Court orders of May 26, 1942 (see pp. 8–9 of this brief).

III. The decision of the Wisconsin Supreme Court in affirming the assessment order of November 29, 1941 did not deny any right under the United States constitution.

Petitioners assert that "the action of the Insurance Commissioner and the judgment of the Supreme Court of the State of Wisconsin, in levying an assessment without personal service and without mail notice and without 'service by publication in special proceedings', contravene the Fourteenth Amendment" (Petition for Certiorari, p. 5).

1. The notice given to policyholders by publication was proper and sufficient.

The published notice given to policyholders is the accepted method and the only practical way of giving notice to a large number of policyholders—in this case some 9,500 (Record, p. 61).

The original Articles of the Wisconsin Mutual Insurance Company provided:

"Every person, corporation, association or partnership insured in this corporation shall be a member thereof * * *." (Record, p. 84)

Like provisions were contained in the Amended Articles and in its By-laws (Record, pp. 85, 86), and in its policies of insurance (Record, pp. 86, 87, 88).

Likewise, the Articles, By-laws and policies provided, as required by sec. 201.02 (3) Wis. Stats., that policyholders and members should be liable to assessment "to an amount equal, and in addition to the annual premium stated in the policy" (Record, pp. 85, 86, 87, 88).

Consequently, petitioners by becoming policyholders and members of the Company subjected themselves to assessment by the Commissioner in case of liquidation of the Company pursuant to secs. 200.08, 200.09, and 220.08, Wis. Stats. (see Appendix hereof).

Service of the order to show cause for the liquidation of the Company was duly made on the Wisconsin Mutual Insurance Company, and it was represented at the hearings resulting in the liquidation order of February 5, 1941 by its officers, agents and attorneys (Record, pp. 127–128). The liquidation order directed the Company, its officers and agents to turn over to the Commissioner all of its assets and enjoined them from exercising any rights or privileges of the Company (Record, p. 3), and that "this matter be held by the Court for the entering of such further orders or the giving of such further directions as may be necessary from time to time in the liquidation of the business of said Company" (Record, p. 4).

Pursuant to the provisions of the statutes and the terms of the liquidation order, the Commissioner applied to the Circuit Court on October 18, 1941 for the assessment order, and the court fixed a date for hearing and directed that notice thereof be given to the members and policyholders by publication of a notice in the official state paper, the Wisconsin State Journal (sec. 35.63 Wis.

Stats.), a daily newspaper of general circulation published in the City of Madison, Wisconsin, once in each week for three consecutive weeks prior to the date of hearing (Record, p. 8).

The prescribed notice was published and certain members and policyholders, including the petitioner Hinze, appeared in person and by attorneys, and obtained a seventeen day adjournment. On the adjourned date certain policyholders, again including the petitioner Hinze, appeared in person and by attorneys and participated in the hearing which resulted in the assessment order of November 29, 1941 (Record, pp. 8–10, 128).

This procedure followed the accepted practice approved by the Wisconsin Supreme Court, and was, obviously, the only practicable method of giving notice to the 9,500 policyholders (Record, p. 61).

Application of Whitman, 186 Wis. 434, 436.

In re Builders Mut. Cas. Co., 229 Wis. 365; (see Vol. 2107, Cases and Briefs, Case p. 21, Wisconsin State Law Library, containing the record in the case).

In re Liquidation of Wisconsin Mutual Insurance Co., 241 Wis. 394, 6 N. W. (2d) 330 (Record, pp. 127–130).

In the Wisconsin Mutual case the Wisconsin Supreme Court said:

> "The order (i.e. the order to show cause for the assessment) came on for hearing on November 10, 1941, *due notice thereof having been given.*" (241 Wis. 399; 6 N. W. (2d) 332, (Record, p. 128)

In *Pink v. A. A. A. Highway Express, Inc.,* 314 U. S. 201, 207, the court said:

> "It is a familiar rule that those who become stockholders in a corporation subject themselves to liability for assessment when made in conformity to the statutes of the state of its organization, although they are not made parties to the proceeding for levying it. * * * Whether we support these legal consequences by reference to consent of the stock-

> holder or to his assumption of a corporate relationship subject to the regulatory power of the state of incorporation, in either case the procedure conforms to accepted principles, *involves no want of due process,* and is entitled to full faith and credit so far as the necessity and amount of the assessment are concerned. See *Christopher v. Brusselback,* 302 U. S. 500, 82 L. ed. 388, 58 S. Ct. 350, and cases cited. The like principle has been consistently applied to mutual insurance associations, where the fact that the policyholders were members was not contested."
>
> *Pink v. A. A. A. Highway Express, Inc.,* 314 U. S. 201, 207, 86 L. ed. 152, 156–157.

The case of *Christopher v. Brusselback,* 302 U. S. 500, cited by counsel as showing that the assessment order lacks due process of law (Brief, p. 24), in fact holds the exact contrary, for the case is cited in the *Pink* case as authority for the above-quoted rule. Such rule was held inapplicable in the *Christopher* case for the reason that the Federal Farm Loan Act, under which the Joint Stock Land Bank was organized, did "not confer upon the Federal Farm Loan Board any power to levy an assessment on the stockholders, or give to the receiver authority to maintain suit for the enforcement of their statutory liability, or otherwise set up any machinery comparable to that of the National Banking Act for enforcing the stockholders' liability" (302 U. S. 502).

In the instant case Sections 200.08 and 200.09, Wis. Stats., making applicable the provisions of Section 220.08 (see Appendix hereto), expressly confer upon the Commissioner of Insurance the power to levy and collect assessments, etc.

The requirements of "due process," were thus satisfied by the published notice, and by the appearance of the corporation in the liquidation proceedings pursuant to due service on it of the order to show cause for its liquidation.

There was no point or necessity in serving notice of the motion for the assessment order on the Company, other than by publication, for its interests as a corporation were not involved, and

personal service of such notice on a company in liquidation would be a useless formality. As pointed out in petitioners' brief (p. 25), the corporation was at the time practically defunct and could take no action except under the direction of the court. Consequently there was no necessity or reason for giving the corporation personal notice of the motion for the assessment order. Its presence in the proceedings was sufficient to give the court jurisdiction to do everything necessary for its liquidation, including the making of an assessment order upon such notice to policyholders as the court considered desirable and practicable.

Such is the established rule in Wisconsin and elsewhere.

Parker v. Stoughton Mill Co., 91 Wis. 174, 181.

Application of Whitman, 186 Wis. 434, 438.

6 *Fletcher Cyc. Corp.*, p. 7090, sec. 4120.

7 *Fletcher Cyc. Corp.*, pp. 7374–7376, 7422, secs. 4223, 4237.

Notes, 48 A. L. R. 669, 674; 97 A. L. R. 690.

32 *Corpus Juris*, sec. 110, p. 1044.

Bernheimer v. Converse, 206 U. S. 516, 532.

Converse v. Hamilton, 224 U. S. 243, 257.

Pink v. A. A. A. Highway Express, Inc., 314 U. S. 201, 207.

An assessment against policyholders, made on notice by publication, is binding as to the propriety, amount and method of assessment, in a suit against the policyholder to collect the assessment against him.

Taggart v. Wachter, 21 Atl. 2d 141, 148 (Md.).

Pink v. Town Taxi, 21 Atl. 2d 656, 658 (Me.).

23 *Harvard Law Review* 44.

2. Section 262.14, Wis. Stats., has no application to liquidation proceedings under Section 200.08, Wis. Stats.

Petitioners here (appellants below) argued this point in their brief on rehearing before the Wisconsin Supreme Court (pp. 25–28), the same as it is argued here (Petitioners' brief, pp. 21–23), and the Wisconsin Supreme Court in denying the motion for rehearing necessarily ruled that Section 262.14, Wis. Stats., had no application to this liquidation proceeding.

The question as to compliance with Section 262.14, Wis. Stats., is obviously not a Federal question but purely a question of State law, on which the decision of the Wisconsin Supreme Court is conclusive.

Ward & Gow v. Krinsky, 259 U. S. 503, 510; 66 L. ed. 1033, 1036.

3. The point of lack of notice of the assessment order was waived by petitioners (appellants below).

The motions of petitioners (appellants below) of February 28 and April 21, 1942, to set aside the order of November 29, 1941 on grounds going to the merits of the order, constituted a general appearance which waived any possible deficiency in giving notice of the application for the order.

Farmington Mutual Fire Ins. Co. v. Gerhardt, 216 Wis. 457, 461–462.

Schwantz v. Morris, 219 Wis. 404, 409–412.

Evans v. Orgel, 221 Wis. 152, 154, 155.

The above cases rule that even if the assessment order had been entered *ex parte,* without any notice at all (221 Wis. 153), the general appearance of appellants (petitioners here) on their motions to set aside the order and open up the proceedings was a waiver of the defect, if any.

As has been said by the Wisconsin Supreme court, "a defendant cannot be allowed to assert that the court is without proper jurisdiction over him and at the same time ask the same court for other relief which could only be granted by a court having proper jurisdiction."

Simon v. de Gersdorff, 166 Wis. 170, 174.

Furthermore, the appeal from the assessment order of November 29, 1941, constituted a general appearance so that petitioners (appellants below) cannot be heard to object that the notice of application therefor was insufficient.

Schwantz v. Morris, 219 Wis. 404, 413.

Having had the assessment order reviewed on its merits, appellants below (petitioners here) could not assert that it was void for want of personal jurisdiction over them.

4. The Supreme Court of Wisconsin overruled all petitioners' contentions with reference to the merits of the assessment order.

The petitioners set forth in their petition for certiorari (pp. 9–10) their contentions (all non-federal questions) with reference to the merits of the assessment order. No argument is made thereon, probably for the reason that all of such contentions were presented at length in their briefs as appellants before the Wisconsin Supreme Court, and were considered by that court and overruled (Record, pp. 130–140).

IV. The decision of the Wisconsin Supreme Court in affirming the circuit court orders of May 26, 1942 did not deny any right under the United States constitution.

These orders denied petitioners' motions to set aside the assessment order of November 29, 1941.

Petitioners assert in their petition for certiorari that the Supreme Court of Wisconsin requested on the oral argument that

petitioners (appellants below) confine their argument to the assessment order of November 29, 1941, "with the right later to submit questions on the two orders (May 26, 1942) of the lower court" (Petition for certiorari, p. 4).

The above is not an entirely accurate statement of what took place, for the Court merely suggested that, in view of the direct appeal from the assessment order, it was not necessary to discuss the Circuit Court orders refusing to set aside the assessment order. Thus, the Wisconsin Supreme Court said in its opinion:

> "The orders appealed from which denied the motions made by appellants to set aside the order of November 29, 1941, should be affirmed. That order being here upon the merits and being affirmed by this Court, no further consideration need be given to the orders of May 26, 1942.
>
> "As the trial court held, 'no cause has been shown warranting relief on the ground of mistake, inadvertence, surprise or excusable neglect.'" (Record, p. 139)

The facts are:

(1) Appellants did not, on their appeal to the Wisconsin Supreme Court, print in their Case or Brief either of the orders of May 26, 1942 (Record, p. 56), and made no argument in their brief to show that such orders were erroneous, but merely asserted that consideration of the validity of such orders was postponed because appellants were "not certain what position counsel will take with respect to the court's conflicting conclusions" (Appellants' brief below, p. 78).

(2) The Commissioner's brief as respondent pointed out that the orders should be affirmed because appellants had apparently abandoned their appeal therefrom, and in any event that both orders should be affirmed on the merits (Respondent's brief below, p. 80).

The Commissioner's brief also pointed out that the order denying the Sturm and Hinze motion should be affirmed, because not brought on for hearing before the Circuit Court within the sixty

day period prescribed by Section 252.10 (1), Wis. Stats. (Respondent's brief below, pp. 81, 82); and that the order denying the Sharpee motion should be affirmed because no "mistake, inadvertence, surprise and excusable neglect" (Sec. 269.46, Wis. Stats.), on which the motion was grounded, had been shown (Brief of respondent below, pp. 82–86).

(3) Appellants' reply brief made no mention of the orders of May 26, 1942, nor any argument to show their invalidity, and likewise made no reply to the arguments in the Commissioner's brief to the effect that such orders were valid and that the appeal therefrom had been abandoned.

Consequently, the affirmance of those orders involved no denial of due process, since the question of such denial was not presented to the Wisconsin Supreme Court. Even the brief in support of the motion for rehearing made no attack on the validity of these orders of May 26, 1942.

Furthermore, the affirmance of the orders of May 26, 1942 could properly have been made, as it undoubtedly was, for the reasons set forth in the orders of the Circuit Court (Record, p. 130), i.e. that the assessment order was reasonable, legal and equitable; that the order denying the Sturm and Hinze motion had not been brought on for hearing within the time limited by Section 252.10 (1), Wis. Stats.; and that the order denying the Sharpee motion was correct because there was no showing of mistake, etc., as the court in fact squarely held (Record, p. 139).

Petitioners further assert that they have been deprived of a hearing and the opportunity to present testimony in connection with the making of the assessment order. This argument is obviously specious for the following reasons:

(1) The assessment order was properly made on published notice, after a hearing in which various policyholders, including the petitioner Hinze, and their attorneys participated (Record, pp. 9, 128).

(2) The order denying the motion of petitioners, Sturm and Hinze, was properly and necessarily affirmed because the matter was not brought before the Circuit Court until its jurisdiction to act had expired under Section 252.10, Wis. Stats. (Record, p. 130).

(3) The order denying the motion of the petitioners, Sharpee et al., was properly affirmed because no mistake, etc. had been shown (Record, p. 130).

(4) The two orders of May 26, 1942 were properly affirmed by the Supreme Court because such orders were, as above shown, properly and validly made, and also because the appeal therefrom had been abandoned and waived and no argument was made in the Wisconsin Supreme Court to show their invalidity.

Furthermore, petitioners never made any offer of any evidence other than a certified copy of certain liquidation proceedings of December 1938, which copy was received in evidence (Record, pp. 46–51).

All policyholders were given opportunity to participate in the hearings preceding the entry of the assessment order, and the petitioner Hinze did so participate (Record, pp. 82–83), as did Mr. Forkner, the attorney for petitioners (Record, pp. 76–77), as well as attorneys for other policyholders (Record, pp. 57, 58, 74, 75, 77, 79, 80).

V. The refund provision of the assessment order did not deny due process of law.

The petition for certiorari (pp. 6–7) suggests the question that the assessment order of November 29, 1941 denied due process because the Supreme Court of Wisconsin held that if the assessment proved excessive, refund of the excess might be made (Record, pp. 131, 134–135).

However, petitioners' brief makes no argument on this question other than again merely suggesting it (Brief, p. 20).

Consequently no argument on the part of respondent seems necessary other than to point out that the question was fully presented to the Wisconsin Supreme Court (Commissioner's brief before Wisconsin Supreme Court, pp. 14–17).

VI. The assessment order does not constitute an impairment of the obligation of contract.

The petition for certiorari (p. 7) suggests the question that the assessment constitutes an impairment of the obligation of contract under Article I, Section 10, of the Constitution of the United States.

However, no argument is made on this point in petitioners' brief other than the bare assertion on page 20 that the court erred in holding that the assessment did not constitute an impairment of the obligation of contract.

Consequently no argument is here made on this question.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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